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In the Supreme Court of the United States

SUSAN TAVE ZELMAN, Superintendent
of Public Instruction, *et al.*,
Petitioners,

v.

DORIS SIMMONS-HARRIS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

BETTY D. MONTGOMERY
Attorney General of Ohio
DAVID M. GORMLEY
State Solicitor

KENNETH W. STARR
ROBERT R. GASAWAY
Kirkland & Ellis
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000

JUDITH L. FRENCH*
KAREN L. LAZORISHAK
Assistant Attorneys General
30 East Broad Street, 17th Flr.
Columbus, OH 43215-3428
(614) 466-2872

**Counsel of Record*

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Respondents do not take issue with petitioners' fundamental proposition that this case presents a question of profound significance—a question the United States characterizes as one of "vital national importance," United States *Amicus* Brief at 11. Nor do they gainsay that resolution of this recurring issue is essential, as the *Amici* States argue, if States and local school boards are "to meet educational challenges with innovative and meaningful solutions," States *Amicus* Brief at 4.

To the contrary, the Simmons-Harris respondents remain silent on the importance of the issue of school choice, and the Gatton respondents state only that the subject "may warrant review by this Court at some point," Gatton Opp. Brief at 2. Their silence and ambivalence put in bold relief the fact that the issue of school choice is the subject of fierce national debate, having been the subject of voter initiatives in at least five States, School Board Ass'ns *Amicus* Brief at 7, court battles in at least seven States, Claremont Institute *Amicus* Brief at 15, and numerous ongoing educational studies, American Civil Rights Union *Amicus* Brief at 5-6.

In fact, just three years ago, several of the entities that have been most active in representing respondents here (American Civil Liberties Union Foundation, People for the American Way Foundation, and Americans United for Separation of Church and State) petitioned this Court to review the Wisconsin Supreme Court's decision in *Jackson v. Benson*, 578 N.W.2d 602 (Wisc. 1998). Prompt resolution of the issue of school choice, they argued then, was "central both to the development of this Court's Establishment Clause jurisprudence and to the formulation of this nation's education policy, and it therefore warrants the attention of this Court." *Jackson v. Benson*, Case No. 98-376, Pet. for Cert. at 9 (Aug. 31, 1998). They were right then, and their ambivalence rings all the more hollow now. As the *Amici*

States emphasize, continued confusion in this arena not only "undermines the educational stability" of the children enrolled in school choice programs across the country, but also "further exacerbates the problems the programs were enacted to solve." States *Amicus* Brief at 4. This Court's review now is both needed and appropriate.

1. Respondents do not seriously dispute that a direct conflict exists between the decision of the Sixth Circuit below, and the decision of the Wisconsin Supreme Court in *Jackson v. Benson*. In fact, the Gatton respondents candidly admit that petitioners are correct in identifying this conflict. Gatton Opp. Brief at 2-3. The Simmons-Harris respondents assert that there is "no conflict of substance" between the two decisions, Simmons-Harris Opp. Brief at 21, but later contend that the petitioners in *Jackson v. Benson* (the Wisconsin case) were correct in their fundamental analysis. Simmons-Harris Opp. Brief at 22-23. This contention is telling because the *Jackson* petitioners acknowledged then that the Ohio program at issue here "parallels" the Wisconsin program, *Jackson* Pet. at 22, n.19, indicating that the divergent results reached below and by the Wisconsin Supreme Court do, indeed, create a conflict requiring this Court's resolution.

Although the Gatton respondents contend that the conflict with the Wisconsin decision is a "narrow" one, Gatton Opp. Brief at 6, they acknowledge that the two decisions diverge in the consideration they give to alternatives available to parents participating in scholarship programs. *Id.* at 7-8. Unlike the Sixth Circuit, the Wisconsin Supreme Court examined the Milwaukee scholarship program in light of other educational options available to Milwaukee's children. These options included, in addition to schools participating in the scholarship program, neighborhood public schools, other general public schools

within the district, and specialized public schools. *Jackson*, 578 N.W.2d at 618.

a. The educational options available in Cleveland include conventional public schools, magnet schools, community schools, and Scholarship Program schools. Affidavit of Caroline M. Hoxby, Morris Kahn Associate Professor of Economics, Harvard University, ¶5a (R. 95 at 4, Court of Appeals Appendix ("C.A. App.") at 600). The State of Ohio presented unrebutted evidence that scholarship parents in Cleveland consider all these options before enrolling their children in the program. *See* Affidavit of Leigh-Anne Ford (R. 96 at 1041, C.A. App. at 1639); Affidavit of Dayna Hunter (R. 96 at 1050, C.A. App. at 1648). Other parents have rejected the Scholarship Program in favor of another non-traditional alternative. *See* Affidavit of Juanita Ellis (R. 96 at 1038, C.A. App. at 1636); Affidavit of Kathleen A. Bondzio (R. 96 at 1032, C.A. App. at 1630). Some parents return to the Scholarship Program after trying other alternatives. *See* Affidavit of Steven and Lisa Pass (R. 96 at 1063, C.A. App. at 1661).

In view of this variety of choices, Cleveland families seeking a non-religious, independent alternative to the schools operated by the local district will feel no financial pressure from the Scholarship Program to send their children to a religious school instead. Hoxby Aff. at ¶¶4h, 5-6 (R. 95 at 4-6, C.A. App. at 600-02). This unrebutted evidence confirms that scholarship families, far from being limited to religious schools, enjoy a genuine choice of educational options for their children.

b. This Court has described an Establishment Clause inquiry as "in large part a legal question to be answered on the basis of judicial interpretation of social facts. . . Every government practice must be judged in its unique

circumstances. . . ." *Santa Fe Indep. School Dist. v. Doe*, 530 U.S. 290, 315 (2000), quoting *Lynch v. Donnelly*, 465 U.S. 668, 693-94 (1984) (O'Connor, J., concurring). The Wisconsin Supreme Court in *Jackson v. Benson* considered all of the relevant circumstances in evaluating the constitutionality of the Milwaukee school choice program. However, the Sixth Circuit—bowing to what it discerned as *Nyquist*-imposed restraints—looked narrowly at the choices available within the Scholarship Program itself, dismissing the other options available to parents as irrelevant. This sharp contrast in analysis, like the divergence in outcomes, presents a clear conflict for this Court's guidance and resolution.

2. Respondents do not dispute petitioners' fundamental point that where a non-religious category of benefit is conferred on a neutrally defined class in circumstances of true private choice, this Court has uniformly held that no Establishment Clause violation exists. Their quarrel lies, rather, in whether the Ohio program offers "true private choice" because 82% of the participating schools are religious and 96% of the participating students are enrolled in religious schools. They rest entirely on the argument that this Court's holding in *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), controls the outcome here.

a. *Nyquist* is not controlling for the fundamental reason that the Ohio program differs from the New York program at issue in that case, and respondents' attempts to recast the Ohio program are unavailing. *See* State Pet. at 24; United States *Amicus* Brief at 14; States *Amicus* Brief at 8. Nor does respondents' narrow focus on the question whether the Ohio program falls within the school aid programs identified in footnote 38 of *Nyquist* respond in any way to petitioners' "principal argument" for granting *certiorari*. *See* Simmons-

Harris Opp. Brief at 9. To be sure, footnote 38 reserves judgment on "a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited," *Nyquist*, 413 U.S. at 782, n.38, and we believe that the Ohio program falls within that reserved case. But *Nyquist* in no way limits the universe of constitutionally permissible school aid programs to those specifically enumerated in footnote 38, nor have the Court's post-*Nyquist* decisions created such a limitation. To the contrary, the Court's decisions provide a roadmap for determining whether a school aid program is constitutional, and the Ohio program fits well within those signposts.

b. Respondents are also misguided as to the importance of the *Nyquist* distinctions at this advanced stage in the development of this Court's Establishment Clause jurisprudence. Even if this case were not distinguishable from *Nyquist*, the continued vitality of the *Nyquist* analysis is very much in dispute, as reflected in this Court's post-*Nyquist* teachings. The importance of this ongoing dispute is captured in Justice O'Connor's concurring opinion in *Mitchell v. Helms*, 530 U.S. 793 (2000), where she recognized that "the specific criteria used to determine whether government aid has an impermissible effect have changed." *Id.* at 845 (O'Connor, J., concurring), citing *Agostini v. Felton*, 521 U.S. 203, 223 (1997). Indeed, this doctrinal march is evident in the long line of Establishment Clause cases beginning at least as early as *Mueller v. Allen*, 463 U.S. 388 (1983), *see* State Pet. at 18-25, and continuing through the Court's decision just weeks ago in *Good News Club v. Milford Central School*, 121 S.Ct. 2093, 2001 U.S. Lexis 4312 (June 11, 2001).

Good News Club—an important decision that respondents oddly ignore—reconfirms that "'a significant

factor in upholding governmental programs in the face of Establishment Clause attack is their *neutrality* towards religion.'" *Id.*, 2001 U.S. Lexis 4312 at *28-29, quoting *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 839 (1995) (emphasis in original). *Good News Club* declares that to suggest, as respondents do, that granting religious institutions access to public programs destroys neutrality "defies logic." *Good News Club*, 2001 U.S. Lexis 4312 at *29. As the Court emphasized, "the 'guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.'" *Id.*, quoting *Rosenberger*, 515 U.S. at 839.

c. Nor does inclusion of religious schools destroy the "private choices" that parents enjoy. In their various assessments of the program, respondents repeatedly trumpet the percentages of participating schools that are religious and of participating students that are enrolled in religious schools. They darkly suggest that these purportedly high percentages result from purportedly lower tuition costs in religious schools and, ultimately, from state coercion in some measure. Respondents conveniently forget, however, that "there is no evidence that any of the several nonreligious, private schools participating in the program have *ever* rejected a single voucher applicant for any reason," nor is there any evidence "that any Cleveland public school parent has ever declined to enroll his or her child in a nonreligious, private school in Cleveland because there was a differential cost that was prohibitive." *Simmons-Harris v. Zelman*, 234 F.3d 945, 971 (6th Cir. 2000) (Ryan., J., dissenting) (emphasis in original) (Pet. App. at 51a-52a). In short, nothing in the record suggests that respondents' much-trumpeted percentages are due to anything other than well-considered and truly private

choices made by eligible parents, and the social and cultural characteristics of the Cleveland community.

d. Although respondents long ago conceded that the Scholarship Program had a secular purpose, they take this opportunity to attack the intentions of Ohio's General Assembly (particularly with respect to the inclusion in the program of schools from adjacent public school districts) and the State's educational priorities. These calumnies are both unfair and misguided. As Judge Ryan explained in his dissent below, "there is not the slightest hint in the record that when the Ohio statute was enacted either the legislators or the governor had any idea that the public school districts adjacent to Cleveland would not participate," *id.* at 968 (Pet. App. at 46a), and there is no reason to doubt it now. *See also Wallace v. Jaffree*, 472 U.S. 38, 74 (1985) (O'Connor, J., concurring) (inquiry into legislative purpose "should be deferential and limited"), citing *Everson v. Board of Educ.*, 330 U.S. 1, 6 (1947) (courts must exercise "the most extreme caution" in assessing whether a state statute has a proper public purpose).

Notwithstanding respondents' baseless insinuations, the Ohio General Assembly enacted the Scholarship Program to provide alternatives to public education for families in districts like the Cleveland school district, which was facing great challenges. Although the public schools in Cleveland have improved, *see* Center for Educ. Reform *Amicus* Brief at 5-10, education reform, including the assessment and development of alternatives, must continue. It is for that very reason that the State of Ohio comes before the Court in this case—to seek much-needed clarification of the options available to lawmakers and educators as they fashion solutions for our most challenging educational problems.

3. What is manifest from respondents' oppositions is that a state of confusion reigns over this Court's Establishment Clause jurisprudence. As the Simmons-Harris respondents concede, the record in this case is well-developed and demonstrates that the Scholarship Program has had its "intended effect of enabling thousands of children from lower-income families to attend sectarian [and, the State submits, non-sectarian] private schools. . . ." Simmons-Harris Opp. Brief at 9, n.6. This case is, accordingly, an ideal vehicle for resolving the constitutional uncertainties that have long plagued debates over school choice by providing definitive answers to these vital constitutional questions of the highest order.

CONCLUSION

For these reasons and those set forth in our petition, the petition should be granted.

Respectfully submitted,

BETTY D. MONTGOMERY
Attorney General of Ohio
DAVID M. GORMLEY
State Solicitor

KENNETH W. STARR
ROBERT R. GASAWAY
Kirkland & Ellis
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000

JUDITH L. FRENCH*
KAREN L. LAZORISHAK
Assistant Attorneys General
30 East Broad Street, 17th Flr.
Columbus, OH 43215-3428
(614) 466-2872

**Counsel of Record*

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